(2)

Supreme Court, U.S.
FILED
MAY 2 2 2003
OFFICE OF THE CLERK

No. 02-1548

In The

Supreme Court of the United States

STATE OF NEW HAMPSHIRE DEPARTMENT OF HEALTH & HUMAN SERVICES,

Petitioner,

v.

ESTATE OF GERALDINE A. RADUAZO,

Respondent.

On Petition For A Writ Of Certiorari To The New Hampshire Supreme Court

BRIEF IN OPPOSITION

JOHN P. MCGEE, JR.
Counsel of Record
FLYNN & MCGEE, P.A.
222 Court Street
Portsmouth, NH 03801
(603) 436-5360

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

12pp

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I THE NEW HAMPSHIRE SUPREME COURT'S RULING DOES NOT CONFLICT WITH DECISIONS OF NUMEROUS FEDERAL COURTS OF APPEAL, INCLUDING THE FIRST CIRCUIT.	3
II THE NEW HAMPSHIRE SUPREME COURT'S RULING DID NOT MISCONSTRUE TITLE XIX OF THE SOCIAL SECURITY ACT	7
III THE QUESTION PRESENTED DOES NOT APPEAR TO BE RECURRING NOR IMPORTANT AS TO FEDERAL LAW	8
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Willden, 314 F.3d 1004 (9th Cir. 2002) 6, 8

Barton v. Summers, 293 F.3d 944 (6th Cir. 2002) 5

Cardenas v. Anzai, 311 F.3d 929 (9th Cir. 2002).....5, 6

Greenless v. Almond, 277 F.3d 601 (1st Cir. 2002) 5

Harris v. Owens, 264 F.3d 1282 (10th Cir. 2001), cert. den., 122 S. Ct. 2294 (2002)..... 5

Strawser v. Atkins, 290 F.3d 720 (4th Cir.), cert. den., 123 S. Ct. 618 (2002)..... 5

Tyler v. Douglas, 280 F.3d 116 (2nd Cir. 2001), cert. den., 122 S. Ct. 2361 (2002)..... 5

STATUTES

28 U.S.C. § 1396b(d)(3)(B)(i).....5, 7

28 U.S.C. § 1396b(d)(3)(B)(ii).....5, 6, 7

42 U.S.C. § 1396k.....3, 4

N.H. Rev. Stat. Ann. (RSA) 167:14-a 2, 8

COUNTER-STATEMENT OF THE CASE

Respondent, Geraldine A. Raduazo, died December 31, 1997 in Portsmouth, New Hampshire. Respondent was a lifelong smoker. In her later years, she needed extensive medical care. The State of New Hampshire, through its Medicaid Program, contributed $169,765.16 toward that care.

The only asset in Respondent's Estate at the time of her death was her homestead premises. The premises were sold in October of 1998. The State had filed a lien on account of Medicaid payments. Satisfaction of the Medicaid Lien was scheduled for early 1999 when Terry D. Ashe, Executrix, would file her Final Account.

In 1997, the State of New Hampshire had brought an equitable suit/legal action in the Merrimack County Superior Court alleging widespread wrongdoing by various national tobacco companies. On December 11, 1998, the Superior Court approved the State's execution of the Master Settlement Agreement (hereinafter "MSA") thereby settling the suit/action. The MSA did reserve to smokers the right to bring their own actions against the tobacco companies. However, it also released any rights of action held by the State against the tobacco companies. New Hampshire State Statute provides that those who receive certain assistance, including Medicaid, assign their claims against third parties to the State.

After learning of the MSA through news accounts, counsel for Respondent contacted the State Attorney General's Office. Counsel for Respondent suggested that the lien against Respondent had been satisfied with the State's release of her claim for medical expenses against

the tobacco companies by the State. The Attorney General's Office advised counsel for Respondent that a response would take approximately six months. When the matter was still unresolved in late 1999, the Respondent filed a Petition in the Rockingham County Probate Court requesting Declaratory Relief that the release given by the State through the MSA had, in fact, satisfied the outstanding Medicaid Lien.

The Rockingham County Probate Court dismissed such Petition upon the State's Motion For Summary Judgment. The Court determined that Respondent was making a claim for monetary damages barred by sovereign immunity and that further, the State, in bringing litigation against the tobacco companies, was acting on its own behalf and not on behalf of individual Medicaid recipients. The Court further noted that there would be an inability to allocate damages received by the State through the MSA.

Respondent appealed the decision of the Rockingham County Probate Court to the New Hampshire Supreme Court. The Court first held that sovereign immunity was not a bar to Respondent's Petition For Relief. The Court then noted that the State's Petition brought in the Merrimack County Superior Court was replete with references to damages incurred by Medicaid expenditures. The Court further noted that, under RSA 167:14-a, Respondent's claims for medical expenses had been assigned to the State and that it was authorized to bring subrogation actions in its own name. The Court then went on to determine that the State, through the MSA in fact, had released the tobacco companies from claims for medical expenses assigned to the State and that as such, the Respondent was entitled to claim satisfaction to the extent

that her medical expenses were smoking related. The Court remanded the matter to the Probate Court for further determinations consistent with the opinions expressed by the Court.

The State subsequently filed a Motion For Reconsideration which was denied January 22, 2003. Its Petition to this Honorable Court for "certiorari" followed.

REASONS FOR DENYING THE PETITION

The Petition in this case should be denied because the decision of the New Hampshire Supreme Court does not conflict with decisions of numerous United States Courts of Appeal nor does it involve an important question of Federal Law.

I

THE NEW HAMPSHIRE SUPREME COURT'S RULING DOES NOT CONFLICT WITH DECISIONS OF NUMEROUS FEDERAL COURTS OF APPEAL, INCLUDING THE FIRST CIRCUIT.

A number of class action suits were filed in various Federal District Courts following the MSA. Invariably, the suits were filed against various States or their officials by living Medicaid recipients who claimed that they were entitled to share in the monies received by the States on the basis of 42 U.S.C. § 1396k.

The litigants in the class action suits displayed the same creativity that the States had shown in bringing their own suits against the tobacco companies. The Petitions and Complaints used by the States against the

tobacco companies had, as their backbone, the massive damages suffered by the States for Medicaid expenditures. The litigants in the following class action suits against the States quite correctly pointed out that under 42 U.S.C. § 1396k, Medicaid recipients assigned their rights against third parties (including tobacco companies) and the States, after paying themselves and the Federal Government back, were to pay over monies collected to the third parties who were the original assignors.

The class actions brought by Medicaid recipients were universally unsuccessful in the Federal Courts. In the initial phase of such litigation, two main arguments appear. Some Federal Courts chose to dismiss the suits on the basis of the Eleventh Amendment. Other Courts, not wishing to invoke the constitutional issues raised by the Eleventh Amendment, relied upon the retained right of smokers to bring their own actions as specifically reserved in the MSA. A corollary to the latter argument was that Medicaid recipients had only assigned their rights to medical expenses actually paid by the States and not their rights to other aspects of their claims and thus, they had no right to share in the actual monies received.

In the case "at bar", the Eleventh Amendment is certainly not an issue. Further, the law of assignment as well as interpretation of the MSA relative to the law of assignment is appropriate to the jurisdiction of a State Court when such matters are brought before it.

More recently, the various States fighting the class actions brought by Medicaid recipients have argued that Title III of the 1999 Emergency Supplemental Appropriations Act impliedly repealed or modified 42 U.S.C. § 1396k to the extent that States receive money pursuant to the

MSA. Pertinent parts of that legislation have been codified at 42 U.S.C. § 1396b(d)(3)(B)(i) and (ii).

The gist of the argument presented by the State is that by subsection (i) of the Statute, Congress changed the basic law so that settlement funds received by the States from the tobacco companies were not "overpayments" subject to partial reimbursement to the Federal Government and that Subsection (ii) gave the States "carte blanche" to do with monies received from the tobacco companies as they might determine without restriction. Six Courts of Appeal have now, in fact, accepted this argument and denied living Medicaid recipients the right to share in the excess proceeds collected by the States: *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2002); *Cardenas v. Anzai*, 311 F.3d 929 (9th Cir. 2002); *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002); *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001), cert. den., 122 S. Ct. 2294 (2002); *Strawser v. Atkins*, 290 F.3d 720 (4th Cir.), cert. den., 123 S. Ct. 618 (2002); *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001), cert. den., 122 S. Ct. 2361 (2002).

Each of the above cited cases deals with living Medicaid recipients attempting to share in the recovery made by the State. Thus, in those cases, the litigants are literally attempting to put their hands in the State's pocket. This case is critically different. The Respondent is attempting to keep the hands of the State from reaching into her pocket.

The legislative rationale of 42 U.S.C. § 1396b(d)(3)(B)(ii), in allowing the States to keep the tobacco monies without obligation to pay any of it over to third parties, is very understandable especially given the situation where the MSA reserves to individuals the right to bring their own

actions against tobacco companies for their own damage and injury. In this case, however, if the Respondent is forced to pay back to the State Medicaid monies advanced by it, she has no right over against the tobacco companies since the State has already released those claims through the MSA. Living Medicaid recipients seeking money is not only far different from the case "at bar", but application of the Statute as suggested by Petitioner, would do violence to the concept of "due process" and impute to Congress a statute which takes away vested property rights without compensation or adequate protection of "due process."

Only one Circuit has dealt with the issue of an estate being given credit against a Medicaid lien as a result of the MSA. A panel of the Ninth Circuit in *Anderson v. Willden*, 314 F.3d 1004 (9th Cir. 2002) "per curiam" found that *Cardenas v. Anzai*, 311 F.3d 929 (9th Cir. 2002) held that 42 U.S.C. § 1396b(d)(3)(B)(ii) precludes any Plaintiff from establishing any claim for their own accounts arising from the tobacco settlement. Respondent would contend that that was an unwarranted expansive reading of *Cardenas* and, that further, it failed to take into account the aforementioned issues relative to "due process" and wrongful taking. Moreover, 42 U.S.C. § 1396b(d)(3)(B)(ii) says nothing about precluding Plaintiffs from establishing any claim. It does say that a State may use amounts recovered from the MSA for any expenditures determined appropriate by the States. Given this, the circumstances of *Anderson* are very different from the case "at bar".

The New Hampshire Supreme Court ruled that a State Statute and a corollary principle of law (i.e., release by a subrogee extinguishes a claim) eliminated the right of the Recovery Division of the New Hampshire Department of Health and Human Services to collect a second time

from the Estate, monies received from the tobacco companies for medical expenses paid out for any smoking related illness suffered. To the extent that this may even be considered an "expenditure" within the meaning of 42 U.S.C. § 1396b(d)(3)(B)(ii) (and Respondent contends it is not), it is an expenditure deemed appropriate by the determination of the Highest Court in the State acting according to the laws of that State. Thus, even if 42 U.S.C. § 1396b(d)(3)(B)(ii) has the meaning which the State wishes to impart to it, crediting the account of the Respondent for monies received from the MSA would be "expenditures determined appropriate by the State".

II

THE NEW HAMPSHIRE SUPREME COURT's RULING DID NOT MISCONSTRUE TITLE XIX OF THE SOCIAL SECURITY ACT.

42 U.S.C. § 1396b(d)(3)(B)(i) and (ii) may preclude a Federal Court from ordering a State to allocate monies received through the MSA to individual Medicaid recipients. It does not preclude a State Court from determining that such allocation constitutes "expenditures determined appropriate by the State". This is especially true when the recipient is not seeking a share in recovery "per se", but rather an order keeping the State from "double dipping". To interpret otherwise would bring into play "due process" issues as well as wrongful taking issues.

Medicaid, moreover, is administered by the States. They are required to pursue recovery, but such recovery needs to be prosecuted through general statutory rules and principles of common law. The recovery, which the petitioning State requests this Court to sanction, is nothing less

than a double recovery. A preclusion of unjust enrichment is certainly far from a misconstruction of the Social Security Act.

III

THE QUESTION PRESENTED DOES NOT APPEAR TO BE RECURRING NOR IMPORTANT AS TO FEDERAL LAW.

The Respondent is somewhat surprised in that the issue presented in the case "at bar" does not appear to be recurring. Other than this matter, the only other reported decision which appears to deal with the issue is the aforementioned Ninth Circuit decision in *Anderson v. Willden*, 314 F.3d 1004 (9th Cir. 2002), ironically, a case decided on the same day as the case "at bar".

Moreover, the case "at bar" involves the New Hampshire Supreme Court's interpretation of a State Statute to wit: RSA 167:14-a and general common law principles of subrogation. Accordingly, there is no real opportunity for this Court to offer a statement of law which will offer widespread assistance.

CONCLUSION

It is respectfully submitted that, for the reasons and authority cited above, the petition for a writ of "certiorari" should be denied.

Respectfully submitted,

JOHN P. MCGEE, JR.,
Counsel of Record
FLYNN & MCGEE, P.A.
222 Court Street
Portsmouth, NH 03801
(603) 436-5360

Attorney for Respondent

Dated: May 22, 2003